

A BSNC Corporation Bhd v Affin Holdings Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS
NO S6-24-1527 OF 2005

B ABDUL MALIK ISHAK J
6 FEBRUARY 2009

C *Banking — Banks and banking business — Sale and acquisition of banking
business — Agreement included clause to reassign shares to plaintiff — Whether
plaintiff entitled to seek declaration for reassignment of accounts transferred to
and vested in second defendant under agreement — Whether plaintiff estopped
from interpreting clause in agreement differently — Banking and Financial
Institutions Act 1989 s 49*

D *Civil Procedure — Mode of commencement — Originating summons — Action
for declaration for reassignment of accounts transferred to and vested in second
defendant under agreement — Whether ought to be by way of writ*

E The whole of the plaintiff's banking business was sold and transferred to the
second defendant under the terms of an acquisition of business agreement
(‘the agreement’) dated 30 August 2000, which was implemented on
F 1 January 2001 pursuant to an order of the High Court dated 18 December
2000. The first defendant had agreed to pay the plaintiff the sum of
RM338,560,000 (‘the original purchase price’) for the plaintiff's banking
business, which was later revised to RM338,980,000. The agreement was
G executed by the defendants on the representation of the plaintiff that its
audited accounts would reflect the assets being acquired by the defendants. In
particular, the plaintiff represented that its net tangible assets (‘NTA’) had
been RM112.8m. By cl 2.1.5 of the schedule to the agreement (cl 2.1.5), the
plaintiff had also warranted that all the plaintiff's accounts were in the nature
H of performing loans and recoverable in the ordinary course of business with
the exception of those loans identified as bad debts in the plaintiff's audited
accounts which had been excluded in computing the plaintiff's NTA. The
said clause further provided that if within 30 days of completion the second
defendant discovered that the alleged performing loans were non-performing
I they could return the same to the plaintiff and claim repayment up to a
maximum of 30% of the purchase price paid for the merger. However, upon
acquiring the assets of the plaintiff the defendants discovered that there were
discrepancies and non-compliance by the plaintiff of Bank Negara's (‘BN’)
guidelines leading to a material deterioration in the NTA value of the assets

acquired from the plaintiff. These discrepancies came to light in the course of the audit exercises conducted by both Bank Negara and Price Waterhouse Coopers in order to ascertain the value of the accounts that were transferred to and vested in the second defendant under the agreement. A meeting was thereafter held on 31 October 2001 to resolve the over-estimation of the value of the plaintiff's banking business. After a series of discussions and an exchange of correspondence between the parties as to the value of the plaintiff's banking business the defendants agreed to a reassignment of debts back to the plaintiff as a 'gesture of goodwill'. However, the agreement to reassign these debts was subject to the plaintiff obtaining the prior written approval from the Minister of Finance pursuant to s 49 of the BAFIA. The plaintiff thereafter wrote to BN asking for a reassignment of the loans from the second defendant without identifying the loans to be reassigned. BN responded by stating that a formal application had to be made by the second defendant. As advised the second defendant wrote to BN and sought approval under BAFIA for an assignment to the plaintiff of the debtor's accounts, again without identifying the accounts but stating that the particulars of the debtors' accounts were being finalised. BN notified the second defendant and the plaintiff that the Minister had exempted the second defendant from the provisions of s 49 of the BAFIA in respect of the proposed retransfer of the loan accounts to the plaintiff but that the plaintiff was not given any corresponding approval or exemption to receive and operate these accounts. The plaintiff had therefore proceeded by way of this originating summons application seeking, inter alia, a declaration for the reassignment of the accounts transferred to and vested in the second defendant under the agreement. It was the plaintiff's contention that cl 2.1.5 entitled the plaintiff to a reassignment of all the accounts assigned to the second defendant and on reliance upon that contention the plaintiff sought the reassignment of RM578m out of the RM4.7b value of the debts acquired by the second defendant. The defendants in turn filed an originating summons application seeking, inter alia, an order that these proceedings be continued as if they had begun by writ. The defendants submitted that the purpose of cl 2.1.5 was to give the second defendant the right to reject, within 30 days of completion, any accounts which it was dissatisfied with by reassigning those accounts to the plaintiff, with the maximum value of the accounts to be reassigned to be RM101,694,000 ie 30% of the acquisition price. This judgment concerned both these applications.

Held, allowing the defendants' application with costs in the cause:

- (1) Upon perusal of cl 2.1.5 it was clear that it did not bear the meaning given to it by the plaintiff. The interpretation assigned to the said clause by the plaintiff means that upon invocation of the said clause, all the

- A banking business would be retransferred to the plaintiff and this would negate the whole purpose of the merger (see para 43).
- (2) At all times prior to the commencement of this application, the parties to the agreement had interpreted cl 2.1.5 to mean that the maximum value of the accounts to be reassigned to the plaintiff was to be RM101,694,000 or 30% of the acquisition price. In fact the plaintiff in its correspondence with the defendants had accepted that its rights were circumscribed and limited to RM101,694,000, being 30% of the acquisition price. There was therefore a common understanding between the parties when they concluded the agreement and as reflected in their correspondence later that the plaintiff's rights upon reassignment were to be RM101,694,000. In the circumstances the plaintiff was estopped from contending that cl 2.1.5 had a different meaning (see paras 45–47).
- D (3) It is settled law that parties may by their subsequent conduct give a term in an agreement a particular meaning. In this case the contemporaneous conduct of the parties subsequent to the making of the contract may be used by the court to interpret the agreement. As such the letters exchanged by the parties could be used to interpret the agreement (see paras 53 & 56).
- E (4) The value of the accounts to be reassigned to the plaintiff which were in the region of RM578m and which were disputed by the defendants had not been identified. The plaintiff was relying on a list of accounts audited by BN in arriving at the value of the accounts to be reassigned to it. These discrepancies and other material questions of fact could only be resolved by way of oral evidence, ie, evidence of those involved in the various transactions, and not by affidavit evidence. The disputes of fact had to be resolved before the plaintiff was entitled to secure any part of its claim. In addition it was also pointless to seek a declaration when facts were in dispute (see paras 58, 62, 71–72).
- F
- G

[Bahasa Malaysia summary]

- H Keseluruhan perniagaan perbankan plaintif telah dijual dan dipindahkan kepada defendan kedua di bawah terma-terma perjanjian pengambilalihan perniagaan ('perjanjian') bertarikh 30 Ogos 2000, yang telah dilaksanakan pada 1 Januari 2001 menurut perintah Mahkamah Tinggi bertarikh 18 Disember 2000. Defendan pertama telah bersetuju untuk membayar plaintif sejumlah RM338,560,000 ('harga belian asal') bagi perniagaan perbankan plaintif, kemudiannya diubah kepada RM338,980,000. Perjanjian telah disempurnakan oleh defendan-defendan atas representasi plaintif bahawa akaun-akaun auditnya menggambarkan aset-aset yang telah diperolehi oleh defendan-defendan. Terutamanya, plaintif menggambarkan
- I

bahawa aset ketara bersih ('AKB') berjumlah RM112.8 juta. Melalui klausa 2.1.5 jadual perjanjian (klausa 2.1.5), plaintif juga menjamin semua akaun-akaun plaintif adalah secara semula jadinya pinjaman-pinjaman berbayar dan boleh diperolehi dalam keadaan biasa perniagaan dengan pengecualian pinjaman-pinjaman yang dikenalpasti sebagai hutang-hutang lapuk di dalam akaun-akaun yang diaudit, plaintif yang telah dikeluarkan daripada perkiraan AKB plaintif. Klausa tersebut selanjutnya memperuntukkan bahawa jika dalam tempoh 30 hari penyempurnaan defendan kedua mendapati bahawa pinjaman berbayar merupakan pinjaman tidak berbayar mereka boleh mengembalikannya kepada plaintif dan menuntut pembayaran semula sehingga maksimum 30% daripada harga belian untuk penggabungan. Walau bagaimanapun, setelah memperolehi aset-aset plaintif, defendan-defendan mendapati terdapat percanggahan dan ketidakpatuhan oleh plaintif dalam garis panduan Bank Negara ('BN') yang membawa kepada kemerosotan yang material nilai AKB aset-aset yang diperolehi daripada plaintif. Percanggahan-percanggahan ini semakin ketara setelah kerja-kerja audit yang telah dijalankan oleh Bank Negara dan Price Waterhouse Coopers bagi memastikan nilai akaun-akaun yang telah dipindahkan dan diletak hak ke dalam defendan kedua di bawah perjanjian. Satu mesyuarat kemudiannya dibuat pada 31 Oktober 2001 bagi menyelesaikan nilai anggaran lebihan perniagaan perbankan plaintif. Selepas beberapa siri perbincangan dan berbalas-balas surat antara pihak-pihak kepada nilai perniagaan perbankan plaintif defendan-defendan bersetuju untuk meletakkan semula hutang-hutang kepada plaintif sebagai 'tanda muhibah'. Walau bagaimanapun, perjanjian untuk meletakkan semula hutang-hutang ini adalah tertakluk kepada plaintif mendapatkan kelulusan bertulis daripada Menteri Kewangan menurut s 49 BAFIA. Plaintif selanjutnya menulis kepada BN bertanyakan letak hak semula pinjaman-pinjaman daripada defendan kedua tanpa memperincikan pinjaman-pinjaman yang perlu diletak hak semula. BN menjawab dengan menyatakan bahawa permohonan rasmi hendaklah dibuat oleh defendan kedua. Sebagaimana dinasihatkan defendan kedua telah menulis kepada BN dan memohon kelulusan di bawah BAFIA untuk meletakkan kepada plaintif akaun-akaun penghutang, tanpa memperincikan akaun-akaun tetapi menyatakan bahawa butir-butir akaun-akaun penghutang sedang dimuktamadkan. BN telah memaklumkan defendan kedua dan plaintif bahawa Menteri telah mengecualikan defendan kedua daripada peruntukan s 49 BAFIA berkaitan cadangan pindahan semula akaun-akaun pinjaman kepada plaintif tetapi plaintif tidak diberikan sebarang surat kelulusan atau pengecualian untuk menerima dan menguruskan akaun-akaun ini. Plaintif selanjutnya meneruskan dengan permohonan saman semula ini memohon, antara lain, satu perisytiharan untuk meletakkan semula akaun-akaun yang dipindahkan dan diletak hak kepada defendan kedua di bawah perjanjian. Ia adalah pandangan plaintif bahawa klausa 2.1.5 melayakkan plaintif untuk meletakkan semula bagi semua akaun kepada defendan kedua dan atas

A

B

C

D

E

F

G

H

I

- A kebergantungan dengan pendapat tersebut plaintif memohon perletakkan hak semula RM578j daripada RM4.7b nilai hutang-hutang yang diperolehi daripada defendan kedua. Defendan-defendan sebaliknya memfailkan permohonan saman pemula memohon, antara lain, satu perintah bahawa prosiding-prosiding ini diteruskan seolah-olah ia dimulakan dengan writ.
- B Defendan-defendan menghujahkan bahawa tujuan klausa 2.1.5 adalah memberikan hak kepada defendan kedua bagi menolak, dalam tempoh 30 hari selepas penyempurnaan, sebarang akaun-akaun yang ia tidak berpuas hati dengan meletakkan semula akaun-akuan itu kepada plaintif, dengan nilai maksimum akaun-akaun yang diletak hak sebanyak RM101,694,000 iaitu 30% daripada harga pemerolehan. Penghakiman ini menyentuh terhadap kedua-dua permohonan ini.
- C
- D **Diputuskan**, membenarkan permohonan defendan-defendan dengan kos dalam kausa:
- (1) Setelah meneliti klausa 2.1.5, ia adalah jelas yang ia tidak berpadanan dengan maksud yang diberikan kepadanya oleh plaintif. Tafsiran yang diberikan kepada klausa tersebut oleh plaintif bermaksud selepas penggunaan klausa tersebut, semua perniagaan perbankan boleh dipindahkan semula kepada plaintif dan ini akan mensia-siakan keseluruhan objektif penggabungan (lihat perenggan 43).
- E
- (2) Pada setiap masa sebelum bermulanya permohonan ini, pihak-pihak kepada perjanjian telah mentafsirkan klausa 2.1.5 sebagai bermaksud bahawa nilai maksimum akaun-akaun yang diletak hak semula kepada plaintif adalah RM101,694,000 atau 30% daripada harga pemerolehan. Malahan plaintif dalam surat-menyuratnya dengan defendan-defendan telah menerima bahawa hak-haknya dibataskan dan dihadkan kepada RM101,694,000 yang merupakan 30% harga pemerolehan. Oleh itu ia merupakan persefahaman bersama antara pihak-pihak bila mereka mengikat perjanjian dan sebagaimana digambarkan dalam surat-menyurat mereka bahawa hak-hak plaintif selepas perletakkan hak semula adalah sebanyak RM101,694,000. Dalam keadaan ini plaintif adalah diestop daripada mengatakan bahawa klausa 2.1.5 mempunyai maksud yang berlainan (lihat perenggan 45–47).
- F
- G
- H
- I (3) Adalah menjadi undang-undang biasa pihak-pihak melalui perlakuan mereka yang selanjutnya memberikan maksud dalam sesebuah perjanjian. Dalam kes ini perlakuan semasa pihak-pihak setelah memasuki kontrak boleh digunakan oleh mahkamah untuk mentafsir sebuah perjanjian. Oleh itu pertukaran surat-surat antara pihak-pihak boleh digunakan untuk mentafsirkan sesuatu perjanjian (lihat perenggan 53 & 56).

- (4) Nilai akaun-akaun yang hendak diletak hak semula kepada plaintiff adalah dalam lingkungan RM578j dan telah dipertikaikan oleh defendan-defendan tidak diperincikan. Plaintiff hanya bergantung kepada senarai akaun-akaun yang telah diaudit oleh BN bagi mencapai nilai akaun-akaun yang hendak diletak hak kepadanya. Percanggahan-percanggahan ini dan persoalan-persoalan fakta yang material hanya boleh diselesaikan melalui keterangan lisan, iaitu keterangan mereka-mereka yang terlibat dalam berbagai-bagai transaksi, dan bukan melalui keterangan affidavit. Pertikaian-pertikaian fakta hendaklah diselesaikan sebelum plaintiff berhak kepada sebarang bahagian di dalam tuntutan. Selanjutnya, adalah tidak bermakna memohon perisytiharan apabila fakta-fakta masih dipertikaikan (lihat perenggan 58, 62, 71–72).]

Notes

For cases on banks and banking business generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1877–2022.

For cases on originating summons, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4810–4817.

Cases referred to

- A Roberts & Co Ltd & Anor v Leicestershire County Council* [1961] Ch 555; [1961] 2 All ER 545, Ch D (refd)
- Abdul Majid v Haji Abdul Razak* [1971] 2 MLJ 228, HC (refd)
- Affin Bank Bhd v Datuk Ahmad Zahid Hamidi* [2005] 3 MLJ 361; [2005] 1 CLJ 521, HC (refd)
- Algar v Middlesex County Council* [1945] 2 All ER 243, KBD (refd)
- Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84; [1981] 3 All ER 577, CA (refd)
- Aquaflite Ltd v Jaymar International Freight Consultants Ltd* [1980] 1 Lloyd's Rep 36, CA (refd)
- Australian Crime Commission (successor the National Crime Authority) v Margaret Gray (as administrator of the estate of John Gray)* [2003] NSW SC 111 (refd)
- Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314, CA (refd)
- Beh Lee Liang v Chew Sah Suak & Anor* [1995] 4 MLJ 397, HC (refd)
- Brikom Investments Ltd v Carr & Ors* [1979] QB 467, CA (refd)
- Cairncross & Ors v Lorimer & Ors* (1860) 3 Macq 827, CA (refd)
- Carr v The London and North Western Railway Company* (1874–1875) LR Vol X CP 307, CA (refd)
- Combe v Combe* [1951] 2 KB 215, CA (refd)
- Cornish v Abington* (1859) 4 H&N 549, CA (refd)
- Crabb v Arun District Council* [1976] Ch 179, CA (refd)
- Dunn v Shanks* [1932] NI 66, CA (refd)

- A *First National Bank plc v Thompson* [1996] Ch 231; [1996] 1 All ER 140, CA (refd)
Freeman and another, Assignees of William Broadbent v Cooke (1848) 2 Ex 654, CA (refd)
Greenwood (Pauper) v Martins Bank Ltd [1933] AC 51, CA (refd)
- B *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481; [1999] 2 CLJ 788, CA (refd)
Heane v WE Rogers and JG Lloyd (1829) 9 B & C 577, CA (refd)
Hopgood v Brown [1955] 1 All ER 550, CA (refd)
Lim Pey Lin v Chia Foon Tau & Anor [2002] 1 CLJ 420, CA (refd)
- C *MacLaine and others v Gatty and another* [1921] 1 AC 376, HL (refd)
Mann v Sydney Hunt Motors (Pty) [1958] 2 SA 102 (refd)
Meade v Haringey London Borough Council [1979] 1 WLR 637, CA (refd)
Moorgate Mercantile Co Ltd v Twitchings [1976] QB 225; [1975] 3 All ER 314, CA (refd)
- D *Morrow v Carty* [1957] NI 174 (refd)
Mann v Sydney Hunt Motors (Pty) [1958] 2 SA 102 (refd)
Pesurohjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors [1971] 2 MLJ 30, HC (refd)
Pickard v Sears and Barrett [1837] 6 Ad & E 469 (refd)
- E *Pinsia Development Sdn Bhd & Ors v Hj Abdul Hadi Ahmad & Ors* [2005] 2 MLJ 32; [2005] 1 CLJ 416, CA (refd)
Smith v Hughes (1871) LR 6 QB 597, QBD (refd)
St Marylebone Property Co Ltd v Fairweather & Anor [1962] 1 QB 498, QBD (refd)
- F *Sullivan v Constable* (1931–1932) 48 TLR 369, CA (refd)
Swan v The North British Australasian Company (Limited) (1862) 7 H & N 603; (1863) 2 H & C 175, Ex Ch (refd)
Syros Shipping Co SA v Elaghill Trading Co (The 'Proodos C') [1981] 3 All ER 189; [1980] 2 Lloyd's Rep 390, QBD (refd)
- G *W v G* [1996] NSWSC 43 (refd)
Waltons Stores (Interstate) Ltd v Maher & Anor (1987–1988) 164 CLR 387 (refd)
William Porter & Co Ltd, Re [1937] 2 All ER 361, Ch D (refd)
Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991] 1 QB 1; [1990] 1 All ER 512, CA (refd)
- H *Wyvern Developments Ltd, Re* [1974] 2 All ER 535, Ch D (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 ss 49, 50

- I Evidence Act 1950 s 92

Local Government Superannuation Acts 1937 and 1939 [UK]

Rules of the High Court 1980 O 18, O 28 r 8(1), O 34

Stanley Isaacs (Stanley Isaacs & Co) for the plaintiff.
DP Naban (Nitin V Nadkarni with him) (Lee Hishamuddin Allen & Gledhill)
for the defendants.

Abdul Malik Ishak J (now JCA):

INTRODUCTION

[1] There are two enclosures before me. The first would be the originating summons filed by the plaintiff. The second is the originating summons filed by both the defendants.

[2] The plaintiff's originating summons can be found in encl 1. While the defendants' originating summons can be seen in encl 13.

ENCLOSURE 1

[3] By this enclosure, the plaintiff seeks for the following reliefs:

- (1) A declaration that upon a true and proper construction of cl 2.1.5 of Schedule 1 to the agreement dated 30 August 2000 and executed between the plaintiff of the one part and the defendants of the other part and referred to as the acquisition of business agreement ('the said agreement') together with the letter dated 18 January 2002 from the defendants to the plaintiff, the plaintiff and/or its nominees are entitled to a reassignment of all the rights whatsoever to sue for and the benefits or interest in the debts recoverable from all the debtors of BSN Commercial Bank (M) Berhad which were assigned to the second defendants pursuant to the vesting order of this honourable court dated 18 December 2000 ('the said vesting order') and/or pursuant to cl 2.1.5 of the said agreement;
- (2) That the defendants do execute a deed of assignment in term of the draft deed of reassignment annexed hereto and marked as 'A' within 30 days from the date of this order;
- (3) That the defendants do deliver all the files, records, accounts and all other documents whatsoever relating to the aforesaid debts to the plaintiff and/or their nominees within 30 days from the date of this order in default whereof the plaintiff, their nominees, agents or servants be at liberty to enter upon the premises of the defendants and/or their solicitors where ever situate during office hours and

- A** remove therefrom all the relevant books, records, files and documents whatsoever and take custody of the same pursuant to the aforesaid order;
- B** (4) That an account be rendered by the defendants of all sum of monies recovered and/or received by them from the date of the vesting order as aforesaid and/or pursuant to the aforesaid cl 2.1.5 of the said agreement to the date of this order to the senior assistant registrar of this honourable court and for an order that the defendants do pay over to the plaintiff all sum of monies found to be due by the
- C** defendants to the plaintiff upon the account stated within 30 days from the date of the said order;
- (5) That the defendants to pay the costs of/and incidental to these proceedings; and
- D** (6) Such further relief or consequential orders as may be just and proper.

ENCLOSURE 13

- E** [4] Under this enclosure, both the defendants seek the following orders:
- (1) that these proceedings be continued as if it had been begun by writ;
- F** (2) that in the event an order in prayer (1) above is granted, directions be given for parties to file their respective pleadings, with liberty to any of the parties to apply for further and better particulars thereof;
- (3) the cost of this application be paid by the plaintiff to the defendants; and
- G** (4) any further or other relief that this honourable court deems just and fit.

THE DECLARATION

- H** [5] By way of prayer 1 to encl 1, the plaintiff seeks a declaration and it is in the nature of a declaratory relief before the trial of the action.
- I** [6] Declaratory reliefs play a major role in private law and they serve as a valuable remedy for settling disputes before they reach the point where a right is infringed (see Zamir and Woolf, *The Declaratory Judgment*, 2nd Ed; and PW Young, *Declaratory Orders*, (1975 Ed)). The essence of a declaratory relief is this. It merely states the rights or the legal position of the parties as they stand.

[7] A declaration is a discretionary remedy. The court has the discretion to refuse it if it thinks fit. The court is reluctant to grant a declaration in interlocutory proceedings since this remedy is final in its nature (*Meade v Haringey London Borough Council* [1979] 1 WLR 637 (CA), at p 648).

A

THE FACTS

B

[8] The second defendant — Affin Bank Bhd (hereinafter referred to as the 'second defendant') bought, by way of an acquisition of business agreement dated 30 August 2000 ('the agreement'), the banking business of the plaintiff. The banking business includes loan accounts under which banking facilities were given by the plaintiff to various borrowers ('the accounts').

C

[9] On 18 December 2000, the High Court made an order pursuant to s 50 of the Banking and Financial Institutions Act 1989 (Act 372) ('BAFIA') and by that order the High Court approved the agreement whereby the banking business of the plaintiff vested with the second defendant.

D

[10] By schedule 3 of the agreement, the first defendant — Affin Holdings Bhd (hereinafter referred to as the 'first defendant') had agreed to pay the sum of RM338,560,000 ('the original purchase price') for the plaintiff's banking business (and this sum was later revised to RM338,980,000). The revised price was calculated on the basis of the representations that were made by the plaintiff as reflected in cl 4.1.2 of schedule 1 to the agreement which, inter alia, stated that their audited accounts give a true and fair value in all aspects of the plaintiff's business and its net tangible assets ('NTA').

E

F

[11] By cl 2.1.5 of schedule 1 to the agreement, the plaintiff warranted that all the plaintiff's accounts were in the nature of performing loans and recoverable in the ordinary course of business with the exception that those loans identified as bad debts in the plaintiff's audited accounts had been excluded in computing the plaintiff's NTA.

G

[12] And cl 2.1.5 of schedule 1 to the agreement further provides that if, within thirty days of the completion date, the second defendant discovered that some of those alleged performing loans were in fact non-performing, the second defendant was entitled to return those accounts to the plaintiff and claim repayment up to a maximum of 30% of the purchase price paid for the merger.

H

I

[13] By way of a letter dated 4 April 2001, the first defendant informed the plaintiff that there were amounts due from the debtors in connection with the plaintiff's banking business that were not recoverable within the ordinary course of business but which were not reflected as bad or doubtful debts in

- A the plaintiff's audited accounts. With this scenario in mind, the first defendant made a proposal to execute a settlement agreement in order to record, inter alia, that the plaintiff is liable to both the defendants in the sum of RM101,694,000 pursuant to cl 2.1.5 of the agreement.
- B [14] On 14 April 2001, the first defendant's proposal was accepted by the plaintiff.
- C [15] Audits were conducted by both Price Waterhouse Coopers and Bank Negara in order to ascertain the value of the accounts that were transferred to and vested in the second defendant under the agreement.
- D [16] The interim results of Bank Negara's audit were made available in February 2001. The results showed that Bank Negara had ascertained that the plaintiff had made insufficient provision for some non-performing loans. With this in mind, Bank Negara then proceeded to instruct and did instruct the second defendant to make additional specific provisions in the sum of RM156,429,322 in relation to these accounts.
- E [17] Sometime in June 2001, the audit exercises were finalised and Bank Negara determined that the second defendant had to make further specific provision in the sum of RM104,150,937 for the non-performing loans acquired from the plaintiff.
- F [18] The whole picture was made clearer when these two audits from both Price Waterhouse Coopers and Bank Negara were announced. It was this. That the plaintiff had painted a rosy picture of itself. To put it bluntly, the plaintiff had over estimated the value of its banking business by RM260,580,259. The NTA had changed from approximately RM104.5m as
- G at 31 December 1999 to minus RM117.6m as at 31 December 2000 by comparing the balance sheet at exh 'D1' of encl 5 with s 3 of the agreement as seen at p 65 of exh 'P1' of encl 2. The accumulated losses too had increased from approximately RM353.6m in 1999 to RM575.7m in 2000 as stated in paras 5(e) to 5(g) of encl 5 and para 8.1 of encl 7.
- H [19] Bank Negara went one step further when it prepared a list of non-performing loans by way of an audit exercise. The list showed the adequacy of provisioning the doubtful debts. And where necessary, the list even set out the additional provisioning. The list can be seen in exh 'P16'
- I annexed to encl 4.
- [20] The plaintiff queried by way of a letter dated 2 July 2001 as to why the shares that were due to it from the first defendant had not yet been credited into its CDS account.

[21] The first defendant responded by way of a letter dated 16 July 2001 stating, *inter alia*, that its letter dated 6 April 2001 had only dealt with claims under cl 2.1.5. It was averred that since sending the letter dated 16 July 2001, the defendants had discovered the discrepancies and non-compliance by the plaintiff of Bank Negara's guidelines leading to a material deterioration in the NTA value of the assets acquired from the plaintiff. It was also averred that the defendants are contemplating their next course of action.

A

B

[22] From the affidavit, it appears that a meeting was held on 16 August 2001. And by way of a letter dated 24 August 2001, the plaintiff stated that it would withhold its reply to the first defendant's letter of 16 July 2001.

C

[23] The plaintiff instructed its solicitors Messrs Zul Rafique to demand the transfer of the shares into its CDS account. And the said solicitors did just that by way of a letter dated 3 October 2001 as reflected in exh 'D3' of the defendants' forth affidavit.

D

[24] Messrs Shook Lin & Bok who were the defendants' then solicitors had by letter dated 23 October 2001 made it clear that the audits had raised some serious questions as to the accuracy of the various representations and warranties by the plaintiff in the agreement. Messrs Shook Lin & Bok's letter had brought forth the following factual matrix:

E

- (a) that the agreement was executed by the defendants on the representation of the plaintiff that its audited accounts would reflect the true value of the assets being acquired by the defendants;
- (b) specifically, the plaintiff represented that its NTA had been RM112.8m;
- (c) but, upon acquiring the assets of the plaintiff, the defendants discovered that there were major problems involving the assets particularly in relation to the loans acquired from the plaintiff;
- (d) what is more distressing was this: that an independent audit has revealed that the assets acquired from the plaintiff had a negative NTA of approximately RM117.602m;
- (e) it was quite natural when the defendants required an explanation for this disparity; and
- (f) the defendants' letter dated 6 April 2001 only dealt with cl 2.1.5, and that letter did not set out the full and final settlement of the issues between the parties particularly in regard to the nature of the NTA which was only discovered subsequently and that was in May 2001.

F

G

H

I

[25] Again, from the affidavit, it appears that a meeting was held on 31 October 2001 at the instance of Bank Negara between senior officials of the

A plaintiff and both the defendants in order to resolve the over-estimation of the value of the plaintiff's banking business. But, sad to say, no minutes of the meeting have been produced by way of an exhibit in the affidavit. This prompted the defendants to argue that the minutes may either be kept by Bank Negara or the plaintiff and, if that was the case, the minutes would only
B be made available by way of a discovery if the matter proceeds to trial. A subpoena would certainly be issued to enable the relevant party to attend court and tender the minutes of the meeting.

C [26] Be that as it may, at this meeting it was agreed, inter alia, that the transaction price of the first defendant's shares would be reduced from RM2.80 to RM2.10 per share. This was recorded and reflected in the plaintiff's letter addressed to the managing director of the first defendant dated 12 November 2001 as seen at pp 21–22 of exh 'D3' to the defendants' forth affidavit that was affirmed on 14 November 2005. The letter was
D worded as follows:

E Re: Acquisition of Business Agreement between Affin Holdings Berhad, Affin Bank Berhad (formerly known as Perwira Affin Bank Berhad), Bank Simpanan Nasional and BSN Commercial Bank (Malaysia) Berhad dated 30 August 2000 ('the Acquisition of Business Agreement').

We refer to the above.

F As discussed in the meeting held at Bank Negara Malaysia on the 31 October 2001, the following agreement was reached (subject to approval by relevant parties) namely —

- G (I) Affin Holdings Berhad shall issue the net number of 60,532,143 AHB shares to BSNC as per your letter dated 6th April, 2001.
- (II) The transaction price of the AHB shares to be reduced from RM2.80 per share to RM2.10 per share (5 day weighted average of AHB shares prior to the signing of the Acquisition of Business Agreement).
- (III) The difference as a result in the reduction of the transaction price of AHB shares from RM2.80 per share to RM2.10 per share shall become part of the warranty.

H We have notified our solicitors of the above and they would be forwarding a draft agreement for your concurrence.

We hope that necessary action would be taken to conclude the transaction based on the agreement reached at the meeting.

I [27] Again, from the affidavit, it appears that further discussions were held between the parties wherein the transaction price of the first defendant's shares was agreed to be reduced further to RM1.33 per share. The reduction in price meant that the value of 60,532,143 shares in the first defendant

which were to be issued to the plaintiff towards payment of the purchase price was reduced by RM88,982,250. With this piece of information the plaintiff requested that the sum of RM88,982,250 be added to the sum of RM101.694m and be re-assigned to the plaintiff by virtue of cl 2.1.5 of the agreement.

A

B

[28] The first defendant did not agree to the request advanced by the plaintiff. And by way of a letter dated 12 December 2001, the first defendant rejected any connection between the sum of RM88,982,250 and cl 2.1.5 of the agreement. In that letter, the first defendant categorically stated that there would be no re-assignment of the accounts in respect of this additional sum. This was how the letter was worded (see p 25 of exh 'D3' to the defendants' forth affidavit that was affirmed on 14 December 2005):

C

We cannot agree to the suggestion that the reduction in the issue price of AHB shares be deemed as an additional amount to be paid by BSNC pursuant to paragraph 2.1.5 of schedule 1 of the Acquisition of Business Agreement as this reduction has no relevance to the said paragraph 2.1.5. Thus, there shall not be any assignment of loans to BSNC for that amount.

D

[29] There is another letter that needs to be referred to. It is the plaintiff's letter dated 21 December 2001 addressed to the first defendant as seen at pp 26–27 of exh 'D3' to the defendants' forth affidavit that was affirmed on 14 November 2005. By this letter of 21 December 2001, the plaintiff agreed to accept 60,532,143 shares in the first defendant in full consideration of the balance of the purchase price. The plaintiff accepted and admitted that the value of any accounts re-assigned under cl 2.1.5 could not exceed RM101.694m.

E

F

[30] It must be borne in mind that the plaintiff's letter dated 21 December 2005 is expressly referred to in the first defendant's letter to the plaintiff dated 18 January 2002 as seen at pp 99–100 of encl 2 and marked as exh 'P4'. The crux of the plaintiff's case lies in the letter dated 18 January 2002 but, unfortunately, this letter was not disclosed to the court when the plaintiff initiated this action.

G

H

[31] This would be followed by two letters that were sent by the first defendant on 18 January 2002. The first letter dated 18 January 2002 from the first defendant to the plaintiff can be seen at pp 28–29 of exh 'D' to the defendants' forth affidavit that was affirmed on 14 November 2005, and after referring to the plaintiff's letter dated 21 December 2005, the first defendant stated that cl 2.1.5 of the agreement had no relevance to the settlement. However, the defendants agreed to a re-assignment as a 'gesture of goodwill' and had provided for it in the enclosed 'side letter'. The second letter from

I

- A** the first defendant which is also the 'side letter' was dated 18 January 2002 as reflected at pp 30–31 of the defendants' fourth affidavit and at pp 99–100 of encl 2 marked as exh 'P4' and that letter makes reference to and incorporates the plaintiff's letter of 21 December 2001 and it proceeds to state as follows:
- B** (a) that the consideration payable under the agreement would be deemed settled by the RM67,796,000 cash payment made on 8 January 2001 and the issuance to the plaintiff of 60,532,143 shares in the first defendant;
- C** (b) and thereafter, no party would have any further claims arising under the agreement;
- (c) that pursuant to cl 2.1.5 of the agreement, the second defendant would re-assign debts back to the plaintiff but, it must be noted that the specific debts to be re-assigned were not identified; and
- D** (d) that the agreement to re-assign these debts was subject to the plaintiff obtaining prior written approval from the Minister of Finance pursuant to s 49 of the BAFIA and if no approval was granted, then the matter ends there and no party would have any further recourse against the other parties.
- E**
- F** [32] By way of a letter dated 20 February 2002, the plaintiff returned four copies of the 'side letter' dated 18 January 2002 duly signed. The letter dated 20 February 2002 shows that the acceptance of the 'side letter' dated 18 January 2002 is subject to the execution of a settlement agreement between the parties.
- G** [33] There is a fax dated 7 March 2002 as seen in exh 'D5' annexed to the defendants' fifth affidavit and in this fax the plaintiff forwarded a draft settlement agreement to Affin Merchant Bank. Unfortunately, the settlement agreement was not finalised.
- H** [34] By letter dated 27 November 2002, the plaintiff wrote to Bank Negara asking for approvals under BAFIA for a re-assignment of the loans from the second defendant. However, no records have been produced of any negotiations or agreement reached between the parties in regard to the particular accounts that would be re-assigned to the plaintiff. It seems that the defendants were having difficulty in locating their files and the plaintiff too
- I** has not made full disclosure of its records. The plaintiff says that it has attached exh 'P16' (as seen in encl 4) to its letter of 27 November 2002 to Bank Negara. But this has been denied by the defendants. Exhibit 'P16' is a list of accounts which had been audited by Bank Negara to ascertain the adequacy of provisioning.

[35] Exhibit 'P10' in encl 2 is a letter dated 27 November 2002 from the plaintiff to the second defendant, and by this letter the plaintiff forwarded a draft assignment to the second defendant for its consideration. Unfortunately, the draft assignment does not identify the accounts to be re-assigned.

A

[36] By letter dated 8 January 2003 as seen at pp 106–107 of encl 2 and marked as exh 'P6', Bank Negara responded to the plaintiff's application under s 49 of the BAFIA and stated that a formal application had to be made by the second defendant. As advised, the second defendant by letter dated 7 January 2003 as seen at pp 109–110 of encl 2 and marked as exh 'P7' wrote to Bank Negara and sought for approval under BAFIA for an assignment to the plaintiff of the debtors' accounts — the particulars of which were being finalised. Incidentally, the letter dated 7 January 2003 was signed by the second defendant's company secretary and copied to the plaintiff.

B

C

D

[37] And by letter dated 27 January 2003 as per exh 'P11' annexed to encl 2, the second defendant reverted to the plaintiff with the relevant comments as to the draft assignment. Again, the accounts to be re-assigned were not identified.

E

[38] By letter dated 14 April 2003 as per exh 'P12' annexed to encl 2, the plaintiff wrote to the second defendant and enclosed the revised draft assignment. Once again, the accounts to be revised were not identified.

F

[39] By letter dated 28 January 2004 as per exh 'P9' annexed to encl 2, Bank Negara notified the second defendant and the plaintiff that the Minister had exempted the second defendant from the provisions of s 49 of the BAFIA in respect of the proposed re-transfer of the loan accounts to the plaintiff. However, the plaintiff was not given any corresponding approval or exemption to receive and operate these accounts.

G

[40] Aggrieved, the plaintiff has now issued proceedings seeking the re-assignment to them of the accounts transferred to and vested in the second defendant pursuant to the agreement.

H

ANALYSIS

[41] Prayer 1 of encl 1 makes it abundantly clear that the plaintiff hinges its claim on the meaning of cl 2.1.5 of schedule 1 to the agreement. That clause states as follows (see pp 46–47 of encl 2):

I

- A** 2.1.5 The amounts due from debtors as at the AUDITED ACCOUNTS DATE except those reflected as bad or doubtful debts in the audited accounts of BSNC and which has been excluded in the computation of NTA set out in Schedule 3, will be recoverable in the ordinary course of business in accordance with the agreements between the debtors and BSNC and the regulations and guidelines of Bank Negara Malaysia and none of such debts is subject to any counterclaim or set-off and in the event that the said amounts or any part thereof are not recovered within 30 days of the COMPLETION DATE, BSNC shall pay to the MERGED ENTITY the said amounts or any part thereof as the case may be within 30 days from the date of receipt by BSNC of a letter of demand for the same provided that BSNC's liabilities under this paragraph 2.1.5 shall not exceed an amount equivalent to 30% of the PURCHASE PRICE and upon payment thereof the MERGED ENTITY shall assign all the rights whatsoever to sue for and the benefits or interest in the same to BSNC or their nominee, subject to the approval of all relevant authorities.
- B**
- C**
- D**
- E** [42] It is the plaintiff's contention that cl 2.1.5 of schedule 1 to the agreement entitles the plaintiff to a re-assignment of all the accounts assigned to the second defendant pursuant to the vesting order. Relying on this contention, the plaintiff seeks the re-assignment of a colossal sum of RM578m out of the RM4.7b value of the debts acquired by the second defendant pursuant to the agreement.
- F**
- [43] Upon perusal of cl 2.1.5 of schedule 1 to the agreement, I am of the considered view that it does not bear the meaning given to it by the plaintiff. The interpretation assigned to the said clause by the plaintiff means that upon invocation of the said clause, all the banking businesses would be re-transferred to the plaintiff and this would certainly negate the whole purpose of the merger. It must be borne in mind that the whole business of the plaintiff was sold and transferred to the second defendant under the terms of the agreement dated 30 August 2000 which was implemented on 1 January 2001 pursuant to an order of the high court dated 18 December 2000.
- G**
- H**
- I** [44] The defendants contend that cl 2.1.5 of schedule 1 to the agreement must be interpreted along the lines as alluded to in paras 11 and 12 of this judgment. The defendants hold the view that the purpose of the said clause was to give the second defendant the right to reject, within 30 days, any accounts which it was dissatisfied with. It seems to me that the procedure laid down by the said clause enables the second defendant to send a demand for any accounts which it wants to return, and upon receipt of payment, it is to

re-assign those accounts to the plaintiff. And the maximum value of the amounts to be re-assigned is RM101.694m being 30% of the acquisition price.

A

[45] It seems to me that the plaintiff, at all times prior to the commencement of this action, understood that the said clause should be interpreted like what the defendants have done. Indeed the plaintiff by way of a letter dated 21 December 2001 addressed to the first defendant as seen at pp 26–27 of exh ‘D3’ to the defendants’ fourth affidavit categorically stated that, ‘... as to cl 2.1.5 to schedule 1, the rights due to BSNC shall remain at 30% (RM101.694m) of the acquisition price’. Again, at pp 23–24 of exh ‘D3’ to the defendants’ fourth affidavit, the plaintiff wrote a letter to the first defendant and there the plaintiff accepted that, in the absence of any agreement to the contrary, the plaintiff’s rights were circumscribed and limited to RM101.694m being 30% of the acquisition price.

B

C

D

[46] Common understanding of the meaning of cl 2.1.5 of schedule 1 to the agreement prevail among the parties when they concluded the agreement and this is reflected in the first defendant’s letter to the plaintiff dated 18 January 2002 as seen at pp 30–31 to the defendants’ fourth affidavit marked as exh ‘P4’. That letter was worded in this fashion and it was also marked as exh ‘P4’ at pp 99–100 of encl 2:

E

Acquisition of Business Agreement between Affin Holdings Berhad, Affin Bank Berhad (formerly known as Perwira Affin Bank Berhad) (‘Affin Bank’), Bank Simpanan Nasional and BSN Commercial Bank (Malaysia) Berhad (‘BSNC’) dated 30 August 2000 (the ‘Acquisition of Business Agreement’).

F

1. We refer to your letter dated 21 December 2001 and the meeting at Bank Negara (‘BNM’) on 31 October 2001 (‘the Meeting’).
2. As discussed at the Meeting, we agree to the full and final settlement of the consideration for the acquisition under the acquisition of business agreement by:
 - (a) the cash payment of RM67,796,000 by Affin Holdings Berhad (‘AHB’) to BSNC, which is acknowledged to have been made on January 8, 2001; and
 - (b) the issue of 60,532,143 ordinary shares by AHB to BSNC at an issue price of RM1.33 each;

G

H

and, upon the issue of the said shares to BSNC, the parties under the acquisition of business agreement shall have no further right or claim whatsoever against each other and shall hold each other harmless from any right or claim whatsoever, in respect of, in connection with or arising from the acquisition of business agreement.

I

- A 3. We understand that you have requested for an assignment of debts pursuant to cl 2.1.5 of schedule 1 to the acquisition of business agreement ('the Assignment'). We have no objection to the Assignment PROVIDED ALWAYS THAT:
- B (a) you obtain prior written approval for the Assignment from the Minister of Finance through BNM pursuant to s 49 of the Banking and Financial Institutions Act 1989;
- C (b) in the event that such approval is refused or not obtained and the assignment is not effected for that reason, both parties agree that there shall not be any claim or recourse whatsoever against each other in respect of, in connection with or arising from the Assignment not being effected; and
- D (c) you, as assignee, shall solely bear all costs and expense incurred in relation or incidental to the Assignment.
4. Please signify your acceptance of the above terms of settlement by signing on the duplicate of this letter and returning the same to us as soon as possible."

E

[47] This is where the estoppel doctrine will come into play. The plaintiff is estopped from contending that the said clause has a different meaning. Lord Denning MR in *Moorgate Mercantile Co Ltd v Twitchings* [1976] QB 225 (CA), at p 241; [1975] 3 All ER 314, at p 323, described estoppel as a principle of justice and equity where any person who makes the statement, promise or assurance and who has led another to believe in a particular state of affairs from going back on the words or conduct which led to that belief when it would be unjust or inequitable or unconscionable for him to do so. When used wisely, the doctrine of estoppel is useful as an armoury of the law

F (Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1982] QB 84, (CA), at p 122; [1981] 3 All ER 577, at p 584).

G

H [48] Coke puts it nicely in these salient words:

... a man's owne act or acceptance stoppeth or closeth his mouth to alleage or plead the truth.

I [49] A new edition, being the 13th (29 October 1774), of Sir Edward Coke's First Institute, *A Commentary Upon Littleton*, at s 352 divided estoppel into three categories, namely, estoppel by record, estoppel by deed and estoppel in pais. It must be emphasised that the term estoppel by conduct has been used as an alternative to estoppel in pais.

[50] At common law, estoppel by representation has developed from estoppel in pais (*First National Bank plc v Thompson* [1996] Ch 231, (CA), at p 235; [1996] 1 All ER 140, at p 144). It is said that an estoppel by representation arises when there has been a representation made by one person and on which another person relies and acts so as to alter his own previous position (*Pickard v Sears and Barrett* (1837) 6 Ad & E 469, at p 474; *Freeman and another, Assignees of William Broadbent v Cooke* (1848) 2 Ex 654, at p 663; *Heane v WE Rogers and JG Lloyd* (1829) 9 B & C 577, at p 586); and Elizabeth Cooke, *The Modern Law of Estoppel*, OUP Oxford, 2000, at p 69 described it as a 'reliance — based' estoppel).

[51] At common law, an estoppel by representation arises against the party who made the representation and that party is not allowed to aver that the fact is otherwise than what he had represented it to be (*Carr v The London and North Western Railway Company* (1874–1875) LR Vol X CP 307 at pp 316–317; *Greenwood (Pauper) v Martins Bank Limited* [1933] AC 51, (HL), at p 57; *Re the Local Government Superannuation Acts 1937 and 1939; Algar v Middlesex County Council* [1945] 2 All ER 243, (KBD) at p 250; *Swan v The North British Australasian Company (Limited)* (1862) 7 H & N 603; (1863) 2 H & C 175, (Ex Ch); *Cornish v Abington* [1859] 4 H & N 549 at p 556; *Cairncross and Ors v Lorimer and Ors* (1860) 3 Macq 827, (HL), at p 829; *Re William Porter & Co Ltd* [1937] 2 All ER 361, at p 363; *Hopgood v Brown* [1955] 1 All ER 550, (CA), at p 562, [1955] 1 WLR 213, at p 229; *Smith v Hughes* [1871] 6 QB 597, at p 607; *Dunn v Shanks* [1932] NI 66, (CA); *MacLaine and Ors v Gatty and another* [1921] 1 AC 376, (HL), at p 386; *Sullivan v Constable* (1931–1932) 48 TLR 369, (CA); *A Roberts & Co, Ltd and another v Leicestershire County Council* [1961] Ch 555; [1961] 2 All ER 545; and *St Marylebone Property Co, Ltd v Fairweather & Anor* [1962] 1 QB 498, (CA), at p 508; [1961] 3 All ER 560, at p 563).

[52] The common law estoppel by representation has been extended by equity to include promissory estoppel. And a promissory estoppel may prevent a party to a contract from going back on a concession which he has made to the other party and by that concession it may modify contracts in the sense of suspending or even extinguishing contractual rights. But it cannot by itself give rise to a cause of action (*Combe v Combe* [1951] 2 KB 215, (CA), at p 220, [1951] 1 All ER 767, at p 770) and, it is for this reason, that it has not made any inroads into the doctrine of consideration (*Morrow v Carty* [1957] NI 174; *Mann v Sydney Hunt Motors (Pty)* [1958] 2 SA 102; *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314, at p 324, [1960] 1 WLR 549, at p 561; *Crabb v Arun District Council* [1976] Ch 179 (CA), at p 193; [1975] 3 All ER 865, at p 875; *Aquaflite Ltd v Jaymar International Freight Consultants Ltd* [1980] 1 Lloyd's Rep 36, (CA); *In re Wyvern Developments Ltd* [1974] 2 All ER 535, at p 543; [1974] 1 WLR 1097, at p 1104; *Waltons*

- A *Stores (Interstate) Ltd v Maher & Anor* (1987–1988) 164 CLR 387; *W v G* [1996] NSWSC 43, (4 March 1996); and *Australian Crime Commission (successor the National Crime Authority) v Margaret Gray (As administrator of the estate of John Gray)* [2003] NSWSC III). In short, promissory estoppel cannot be used, at all, to create an enforceable contract because of the absence
- B of consideration (*Brikom Investments Ltd v Carr & Ors* [1979] QB 467 (CA), at p 486; [1979] 2 All ER 753, at p 761; *Syros Shipping Co SA v Elaghill Trading Co (The 'Proodos C')* [1981] 3 All ER 189; [1980] 2 Lloyd's Rep 390; and *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1; [1990] 1 All ER 512, (CA)).
- C
- D [53] Now, the contemporaneous conduct of the parties subsequent to the making of the contract may be used by the court to interpret the contract. Here, I can certainly rely on the first defendant's letter to the plaintiff dated 18 January 2002 marked as exh 'P4' and reproduced earlier to interpret the Agreement. This approach was adopted by the Court of Appeal in *Pinsia Development Sdn Bhd & Ors v Hj Abdul Hadi Ahmad & Ors* [2005] 2 MLJ 32; [2005] 1 CLJ 416. There at pp 419–420, Gopal Sri Ram JCA speaking for the Court of Appeal had this to say:
- E We accept that it is settled law that an agreement may not be interpreted by reference to the subsequent conduct of the parties thereto (see *Wickman Tools v Schuler AG* [1974] AC 235). But it is equally well settled that parties may by their subsequent conduct give a term in an agreement a particular meaning. See,
- F *American Surety Co of New York v Calgary Mining Co Ltd* (1919) 48 DLR 295, a decision of the Privy Council. In such an event it is that meaning which binds the court and the court is not then entitled to discover some other meaning in the exercise of its interpretive jurisdiction. See *Amalgamated Investment & Property Co Ltd (In liquidation) v Texas Commerce Bank* [1982] QB 84; *Boustead Trading (1985) Sdn Bhd v Arab Malaysia Merchant Bank Bhd* [1995] 4 CLJ 283.
- G
- [54] The speech of Lord Denning MR in *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd*, at pp 582–583 merit reproduction. This was what His Lordship said:
- H Subsequent conduct
- I For many years I thought that when the meaning of a contract was uncertain you could look at the subsequent conduct of the parties so as to ascertain it. That seemed to me sensible enough. The parties themselves should know what they meant by their words better than anyone else. In this I was supported by *Watcham v Attorney General of East African Protectorate* [1919] AC 533; [1918–1919] All ER Rep 455, a Privy Council case which was applied repeatedly in my early days in the common law courts. But it was always repudiated by the more logical minds in Chancery. Eventually the logicians prevailed. In *James Miller (James) and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] 1 All ER 796, at p 798, [1970] AC 583, at p 603 Lord Reid said:

... it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.

A

I can understand the logic of it when the construction is clear; but not when it is unclear. Still, we must accept it. Nevertheless a way of escape was left open by Viscount Dilhorne in that very case when he said ([1970] 1 All ER 796, at p 805; [1970] AC 583, at p 611) ... subsequent conduct by one party may give rise to an estoppel.

B

So here we have available to us, in point of practice if not in law, evidence of subsequent conduct to come to our aid. It is available, not so as to construe the contract, but to see how they themselves acted on it. Under the guise of estoppel we can prevent either party from going back on the interpretation they themselves gave to it.

C

[55] And continuing at p 584, Lord Denning MR in that case had this to say:

D

If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it, on the faith of which each of them to the knowledge of the other acts and conducts their mutual affairs, they are bound by that interpretation just as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not, or whether they were mistaken or not, or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it.

E

F

[56] It must be borne in mind that exh 'D3' is a letter dated 21 December 2001 from the plaintiff to the first defendant and that letter can be seen at pp 26–27 to the defendants' forth affidavit and this very letter was specifically referred to in the first defendant's letter to the plaintiff dated 18 January 2002 as seen at pp 30–31 to the defendants' forth affidavit marked as exh 'P4'. Consequently, it is apt to say that exh 'D3' is admissible either as a document incorporated into exh 'P4' or as a collateral warranty or a contract or as a representation. Gopal Sri Ram JCA in *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481 at p 491; [1999] 2 CLJ 788, at pp 798–799 had this to say of collateral warranty by referring to two earlier authorities:

G

H

In the earlier case of *Dick Bentley Productions Ltd v. Harold Smith (Motors) Ltd* [1965] 1 All ER 65, Lord Denning MR said (at p 67):

I

Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to

- A act on it by entering into the contract, that is prima facie ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on.
- B That the position at our common law is no different is made clear by the decision of the former federal court in the leading case of *Tan Swee Hoe Co Ltd v Ali Hussein Bros* [1980] 2 MLJ 16, where at p 18 Raja Azlan CJ (as he then was) said:
- C Although it is trite law that parol evidence is not admissible to add to, vary or contradict a written agreement, a technical way of overcoming the rule is by invoking the doctrine of collateral contract or collateral warranty. *Chitty on Contracts*, 24th Ed, (para 674) put it this way:
- D An assurance given in the course of negotiation may therefore give rise to a contractual obligation, provided that an intention to be bound can be shown. The rules of evidence, however, frequently prevent such an assurance from being incorporated as part of a subsequent written agreement, since extrinsic evidence is as a general rule not admissible to vary or add to the terms of a written contract. As a result, the courts have been prepared in some circumstances to treat the assurance as a separate contract, collateral to the main transaction. In particular, they will do so where one party refuses to enter into the contract unless the other gives him an assurance on a certain point.
- E In our view there is a growing body of authority which supports the proposition that a collateral agreement can exist side by side with the main agreement which it contradicts.
- F In my judgment, the arbitrator's approach to the question of law that arose incidentally before him was correct. It is trite that the device of a collateral contract is one of the methods employed by the law to impose liability for a statement made in the course of negotiations preceding the making of a contract. Very recently, in *Shah Alam Properties v Abdul Razak Abu Samah* (Civil Appeal No 03-43-1998, unreported) this court has set out the propositions of law that operate in the environment of pre-contractual statements. I find it unnecessary to repeat what was there said. Suffice to say that the arbitrator's award with which we are here concerned does not reveal an error of law nor misconduct in the context of the present discussion.
- G
- H [57] I had occasion to say something about collateral agreement in *Affin Bank Bhd v Datuk Ahmad Zahid Hamidi* [2005] 3 MLJ 361; [2005] 1 CLJ 521, and at pp 368-369 (MLJ); pp 528-529 (CLJ), this was what I said:
- I These averments are questions of fact which cannot be determined on affidavit evidence alone. As demonstrated in the following authorities, evidence of surrounding circumstances and factual background are admissible, and that collateral agreement can exist side by side with the main agreement which it contradicts.

The law on collateral oral agreement is clearly spelt out in s 92(b) of the Act. It is recognised as one of the exceptions to the general rule forbidding extrinsic evidence to be adduced to contradict, vary, add to or subtract from, the terms of an agreement which had been reduced into the form of a document. In *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243, Mohd Azmi FJ (as he then was) said:

A

B

For the construction of a written agreement the established doctrine is firstly to exclude evidence of negotiations leading up to the contract on the ground that it is only the final agreement which records a consensus and as such evidence of negotiations is unhelpful; and secondly to exclude evidence of the parties' subjective intentions so that any individual purpose which either of them hopes to achieve by the agreement and their own interpretation and understanding of the agreement is not admissible. As against this, *evidence of surrounding circumstances and factual background have always been admissible*. (Emphasis added.)

C

D

In another case, *Tan Swee Hoe & Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16, which is generally considered as the leading authority on the matter, the appellants had orally agreed to allow the respondents to occupy the premises for as long as they wished upon payment of \$14,000 as tea money. The written tenancy agreements were later executed by the parties but neither referred to the appellants' promise. A dispute arose between the parties and the appellants eventually sued for vacant possession. In their defence, the respondents claimed that under the oral agreement, they were entitled to stay as long as they wished and so long as they paid the rent regularly. The trial judge dismissed the appellants' claim and ordered them to register a lease in favour of the respondents for a term of 28 years. On appeal, it was argued for the appellants that evidence of the oral promise could not be given in view of ss 91 and 92 of the Act. Dismissing the appeal, Raja Azlan Shah CJ (as he then was) held:

E

F

Although it trite law that parol evidence is not admissible to add to, vary or contradict a written agreement, a technical way of overcoming the rule is by invoking the doctrine of collateral contract or collateral warranty.

G

In our view there is a growing body of authority which supports the proposition that a collateral agreement can exist side by side with the main agreement which it contradicts. The classic statement on collateral contracts was made by Lord Moulton in *Heilbut Symons & Co v Buckleton* [1913] AC 30, at p 47 ... The case of *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129 and the subsequent applications of it has, in our opinion, fortified this not unfamiliar doctrine. We think Lord Denning MR summarised it in *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 1 All ER 65, at p 67:

H

I

Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is prima facie

- A** ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on.
- B** Indeed if it is found in the course of the trial, that the second collateral agreement was in existence just like what the defendant has throughout his affidavits maintained, then the plaintiff will be liable, partly if not wholly, for all the losses suffered by the defendant arising from the breach thereof. In my judgment, the two collateral agreements constituted triable issues that should go for full trial.
- C** [58] The list of accounts which had been audited by Bank Negara as per exh 'P16' of encl 4 showed the value of the accounts to be in the region of RM578m and this is the accounts which the plaintiff say that it is entitled to but disputed by the defendants. At best, exh 'P16' in encl 4 is nothing more
- D** than a list from which the accounts are to be re-assigned. However, no attempts have been made to agree as to what are the accounts that are to be re-assigned.
- E** [59] The plaintiff takes the following stand:
- F** (a) that by the Banking and Financial Institutions (Affin Bank Bhd) (Exemption) Order 2003 vide PU(A) 461/2003, the plaintiff without more is entitled to the re-assignment of the banking accounts notwithstanding that the plaintiff remains at all material times a non-licensed institution;
- G** (b) that the defendants are now estopped from challenging the re-assignment of the 106 accounts listed in Annexure 'A'; and
- (c) that the purchase price paid by the second defendant for the transfer of the plaintiff's banking business was reduced substantially pursuant to cl 2.1.5 of schedule 1 to the agreement and after obtaining this reduction in the purchase price, the defendants are obliged to re-assign 106 banking accounts to the plaintiff.
- H** [60] Flowing from these arguments, the plaintiff contends that they have a case suitable to be heard and disposed of on affidavit evidence without the necessity of calling witnesses to be examined.
- I** [61] Both the defendants say that the prayers sought by the plaintiff in encl 1 cannot be granted on affidavit evidence.

[62] I have considered the submissions of counsel from both sides and I am of the view that the following material questions of fact can only be resolved by way of an oral evidence:

- (a) the aggregate value of the accounts that were transferred and vested in the second defendant pursuant to the vesting order is about RM4.7b;
- (b) whereas the 106 accounts that were set out in the list as per exh 'P16' of encl 4 is valued approximately RM578m net;
- (c) and by the plaintiff's own letter of 21 December 2001 which is expressly referred to and incorporated into exh 'P4' to encl 2, the plaintiff accepted and admitted that any re-assignment would be of accounts valued at not more than RM101.694m;
- (d) with these varying figures, it is rather unclear as to how the plaintiff has arrived at the list of accounts wherein the plaintiff now wishes it to be re-assigned;
- (e) the defendants submit and I agree that to date, the plaintiff has not shown any document showing that the list had been agreed upon by the parties despite being challenged by the defendants to do so;
- (f) for all we know, the list at exh 'P16' in encl 4 was conceived as a list of accounts from which parties were to select the relevant accounts to be assigned; and
- (g) the second defendant wrote a letter to the Bank Negara dated 7 January 2003 as seen at p 109 of encl 2 that was marked as exh 'P7' and in this letter the second defendant made it abundantly clear that the accounts to be re-assigned had not been finalised.

[63] The defendants submit that the facts are somewhat scanty and that the documents produced by the plaintiff only give rise to substantial questions and disputes about the facts. According to the defendants that despite a gap of almost one year between the issuance of exh 'P4' in encl 2 and exh 'P5' in encl 2, no correspondence or evidence have been produced by the plaintiff to show categorically how the list of 106 accounts were arrived at. I venture to say that if the parties had agreed upon the list of 106 accounts there would surely have been written records bearing in mind that these accounts are worth more than a billion ringgit.

[64] The defendants found it difficult to obtain the necessary documents. They also found it difficult to obtain the assistance of those persons who were involved in these transactions because most of them were the defendants' former employees. At para 4 of the defendants' forth affidavit as seen in encl 8A, the defendants averred as follows:

- A** Given that the events which form the basis of the plaintiff's claim took place a few years ago, and given that the defendants' officers who were involved had mostly left the employ of the defendants, the defendants have faced considerable difficulties in locating the relevant and necessary documents to enable the defendants to properly defend the plaintiff's claim in these proceedings.
- B**
- C** [65] In rebuttal, the plaintiff has this to say. That it would be a wasteful exercise to proceed for a full trial. According to the plaintiff, the settlement letter marked as exh 'P4' in encl 2 and dated 18 January 2002 was signed by the highest executives of the parties concerned. And that the settlement letter did not call for any negotiation between the parties nor was clarification required from the subordinate officers of the parties involved. The plaintiff says that there is nothing more to be said or add to the terms of the settlement letter. And that finality must be accorded to the settlement letter bearing in mind that the parties 'agree to the full and final settlement of the consideration for the acquisition under the acquisition of business agreement' (employing the words used in the settlement agreement).
- D**
- E** [66] The plaintiff also points out that by virtue of s 92 of the Evidence Act 1950 (Act 56), oral evidence cannot be adduced to contradict the settlement agreement.
- F** [67] The plaintiff submits that Dato' Lodin Wok Kamaruddin was one of the signatories to the Agreement and the prime mover of the settlement agreement and he is still holding the highest executive office with the first defendant. Flowing from this, the plaintiff submits that the said Dato' could affirm an affidavit to comment or qualify the settlement agreement.
- G** [68] The plaintiff also submits that it is a matter of judicial interpretation for this court to interpret cl 2.1.5 of schedule 1 to the agreement and there is no explanation needed from anyone to assist this court to exercise its judicial function in interpreting the said clause.
- H** [69] According to the plaintiff, whatever evidence that are material to this case have been placed before this court through lengthy affidavits and that neither party had been denied the opportunity to present to this court any piece of evidence that is perceived to be material to this case.
- I** [70] Finally, the plaintiff submits that there are no triable issues and that only mere contentions have been raised which cannot be construed as triable issues.

[71] I must make two salient observations. Firstly, that disputes of fact must be resolved before the plaintiff is entitled to secure any part of its claim. Secondly, it is also pointless to seek a declaration where the facts are in dispute.

A

[72] By way of prayer 1 of encl 1, the plaintiff seeks an order that all accounts that were transferred to and vested in the second defendant pursuant to the vesting order be re-assigned to the plaintiff. This re-assignment would involve accounts to the value of RM4.7b — a huge amount. And by way of prayers 2 to 6 of encl 1, the plaintiff seeks orders requiring the defendants to re-assign certain specified accounts which carries a value of RM578m. But this sum goes against the plaintiff's letter dated 21 December 2001 which states that the value of the accounts to be re-assigned was only RM101.694m. All these discrepancies cannot be resolved by way of an originating summons as per encl 1. What Chang Min Tat J, said in *Abdul Majid v Haji Abdul Razak* [1971] 2 MLJ 228, at p 229, is quite apt and would apply in the context of this case:

B

C

D

On the authorities, it would appear that questions of jurisdiction apart, courts would refuse to decide questions of fact on an originating summons as a matter of some inconvenience.

E

[73] His Lordship Low Hop Bing J, in *Lim Pey Lin v Chia Foon Tau & Anor* [2002] 1 CLJ 420, at pp 425–426 made the following germane observations:

From the respective affidavits generally and more specifically the conflicting allegation of facts as alluded to above, coupled with the submissions respectively presented for both the plaintiff and the defendants, there is no doubt in my mind that there is likely to be substantial dispute of fact, which would render the originating summons procedure eminently unsuitable or inappropriate. The various inconsistencies manifested in the aforesaid affidavits could only be resolved by viva voce evidence, going through the process of cross-examination and re-examination, therefore necessitates the writ procedure to be invoked.

F

G

Order 28 r 8(1) is crucial here and is reproduced as follows:

- (1) Where, in the case of a cause or matter begun by originating summons, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.

H

I

It is trite law that as soon as there is a likelihood of any substantial dispute of fact, the court is empowered to make an order that an originating summons be converted and continued as a writ action — *Re Deadman (decd) Smith v Garland*

- A *Ors* [1971] 2 All ER 101; 1 WLR 426 as approved in *Ting Ling Kiew & Anor*. See also eg, *Khoo Kheng Sim v Khoo Chooi Leong & Anor* [2001] 4 AMR 4552; *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 4 CLJ 561; *Beh Lee Liang v Chew Sah Suak & Anor* [1995] 4 MLJ 397.
- B In *Ong Ah Moy*, the federal court through the judgment of Chang Min Tat FJ (as he then was) categorically stated that an originating summons was not a convenient medium to try disputed questions of fact.
- C On the foregoing grounds, in respect of the first prayer, I hold that the proceedings herein shall continue as if this case or matter had been begun by way of a writ and further order that the parties to deliver their pleadings in accordance with O 18, as has been similarly ordered by the supreme court in *Ting Ling Kiew & Anor*. I also further order that the parties herein comply with O 34 of the Rules of the High Court 1980 as amended vide PU(A) 342/2000 and which came into force on 22 September 2000.
- D [74] Raja Azlan Shah J (as His Royal Highness then was) in *Pesurohjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors* [1971] 2 MLJ 30, at p 32, succinctly sets out the law in this fashion:
- E I now come to the question of procedure. The respondents contend that the action should have proceeded by way of writ and not originating summons because disputed questions of fact and law are involved. When a question of fact is at issue action is to be by way of writ and not by originating summons. This is because the facts have to be established by examination and cross-examination of witnesses.
- F In the present case the disputed question of fact would be as to the number of squatter families removed from the said land. The question now is whether the number of squatter families is a relevant question rendering it necessary to be established by examination of witnesses in court. The determination of number of squatter families would be crucial under the unamended 1969 Regulations because the mode of computing compensation under reg 7(a)(v) is by squatter families. But
- G with the amendment the method of computing is by way of area.
- H [75] Accordingly, I hold that the proceedings herein shall continue as if this case or matter had begun by way of a writ and I too make a further order that the parties do deliver their pleadings in accordance with O 18 of the Rules of the High Court 1980 ('RHC'). In addition thereto, I also make a further order that the parties herein comply with O 34 of the RHC and the trial of the whole suit to be conducted before my successor's successor — the current presiding judge of Civil 6 Court at Jalan Duta Court Complex.
- I [76] A writ action would certainly enable the parties to embark on a full scale discovery of documents within their possession. In this way, the defendants would be in a position to cross-examine the relevant witnesses of the plaintiff on events that took place and which led to the preparation of the

list at exh 'P16' to encl 4. The defendants would also be afforded the opportunity to subpoena its former officers to give evidence on events which took place at the material time.

[77] Other inconsequential issues that were raised are not being considered in this judgment.

[78] For the reasons adumbrated above, I order that encl 1 be continued as if the proceedings had been begun by writ under O 28 r 8(1) of the RHC (see *Beh Lee Liang v Chew Sah Suak & Anor* [1995] 4 MLJ 397) subject to the further order that the parties are to deliver their pleadings in accordance with O 18 of the RHC and to comply with the rigours of O 34 of the RHC. And as for encl 13, I would accordingly allow it. As for costs, I would make an order that costs be in the cause.

Defendants' application allowed with costs in the cause.

Reported by K Nesan

A

B

C

D

E

F

G

H

I